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No. 03-762

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANTEE SIOUX TRIBE OF NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The United States seeks review of the Eighth Circuit's holding in this case that the definition of "gambling device" in the Johnson Act, 15 U.S.C. 1171 *et seq.*, does not encompass machines, such as the one in this case, that incorporate into their operation a pre-printed paper roll containing symbols that determine whether a player has won or lost. As explained in the certiorari petition (at 16-18), the Eighth Circuit's ruling on this issue conflicts with a decision of the Ninth Circuit holding that a machine having the same features is a "gambling device" covered by the Johnson Act. Respondent offers no valid reason to conclude that the question presented here is not a significant one for the enforcement of federal gambling laws both inside and outside Indian country. Nor does respondent dispute that this case provides a suitable vehicle in which to resolve that question.

A. RESPONDENT FAILS TO DEMONSTRATE THAT THE IMPORTANT QUESTION OF STATUTORY CONSTRUCTION IN THIS CASE WAS CORRECTLY RESOLVED BELOW

Contrary to respondent's assertion, the question presented in this case involves not mere "[e]rror [c]orrection." Br. in Opp. 13. It instead involves a question of construction

of an important federal criminal statute, the Johnson Act—a question and a statute that have particular importance because of the widespread introduction of gaming into Indian country and the rapidly increasing use of devices like those at issue here in tribal gaming operations. See Pet. at 19-21, *Ashcroft* v. *Seneca-Cayuga Tribe*, No. 03-740 (filed Nov. 21, 2003); Amici Br. of States of California, et al., at 1-5, *Seneca-Cayuga Tribe*, *supra*. This Court frequently grants certiorari, even in the absence of a circuit conflict, in cases that "concern the construction of a major federal statute." *United States* v. *Donovan*, 429 U.S. 413, 422 (1977); see Robert L. Stern, et al., *Supreme Court Practice* 247-249 (8th ed. 2002). The Eighth Circuit understood the issue here to be one of statutory construction—*i.e.*, whether the definition of "gambling device" in 15 U.S.C. 1171(a)(2) is satisfied when the "element of chance" is supplied by a paper roll of pull-tabs installed within the machine. See Pet. App. 8a-10a.

Respondent, in fact, *conceded* in the courts below that the Lucky Tab II machine in this case satisfies the Johnson Act's "gambling device" definition, even though respondent now maintains that the Eighth Circuit correctly held otherwise. Compare Br. in Opp. 14-16, with Resp. C.A. Br. 36 n.17 (["T]he Tribe did not dispute [in the district court] that the Lucky Tab II dispenser fell within the * * * broad definition of a 'gambling device' under the Johnson Act."), and Gov't C.A. App. 200-201, 218-219.[1] Respondent's own

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[1] At the evidentiary hearing in the district court, respondent's counsel (who remains its counsel of record in this Court) engaged in the following exchange with the court:

> MR. SCHULTE: The issue is whether or not these devices are exempt from the Johnson Act. I don't believe we are disputing that they qualify under the definition of a Johnson Act device.
>
> THE COURT: So what you're saying is that these are Johnson Act devices, and the question really is whether these device are exempted under the Indian Gaming Act?
>
> MR. SCHULTE: That's correct, Your Honor.

prior position on the question undermines its current assertions that the court of appeals' construction of the Johnson Act is textually compelled. Nor does respondent point to anything in the Johnson Act's language or history that supports, much less requires, the court of appeals' unduly restrictive reading of the Act.

The Johnson Act defines a gambling device to include "any * * * machine or mechanical device [that is] designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2). As the United States previously explained (see Pet. 11-13), the Lucky Tab II machine satisfies that definition. Lucky Tab II is "designed and manufactured primarily for use in connection with gambling"—a point that has never been disputed either by respondent or by the courts below. A player becomes "entitled to receive * * * money or property" when the Lucky Tab II dispenses a winning pull-tab that can be redeemed for money. And, finally, whether the machine dispenses a winning pull-tab to a given player turns on the application of various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, how many times previous players have played the machine, and the number of pull-tabs that the current player intends to buy.

Gov't C.A. App. 218-219; see *id.* at 200 (respondent's counsel acknowledges that the "gambling device" definition in the Johnson Act "would literally * * * apply to a box with a slot on it with a mechanical handle on it to dispense pull-tabs"). In its appellate brief, respondent similarly argued that the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, has made the Johnson Act "irrelevant" to gambling devices that are used as purported Class II "technologic aids"—not that, if the Johnson Act *is* applicable to such devices, Lucky Tab II would not satisfy the Johnson Act's "gambling device" definition. See Resp. C.A. Br. 17, 36-37 n.17.

There is no merit to respondent's assertion that Section 1171(a)(2) cannot reach machines such as Lucky Tab II without reading the words "the application of" out of the statute. Br. in Opp. 14. Nothing in the statutory text requires that the "element of chance" be "appli[ed]" in any particular manner—for example, by a permanent component of a machine (such as a computer), as distinguished from a removable component (such as a roll of paper pull-tabs). Any such distinction would be entirely artificial because the paper pull-tab roll, once installed as an essential part of the Lucky Tab II, is as much a part of the machine's operation as would be, for example, a computer that determined winners and losers (and that could itself be removed and reprogrammed). See Pet. App. 5a (recognizing that Lucky Tab II "cannot function" without the "roll of paper pull-tabs in place"). Nor would such a distinction comport with Section 1171(a)(2)'s express application to "roulette wheels and similar devices" —which are incapable of applying any "element of chance" without the addition of a removable component, the roulette ball. Although the foregoing points are set forth in the certiorari petition to demonstrate how the court of appeals erred in its construction of Section 1171(a)(2), respondent does not even attempt to answer them. Respondent likewise does not explain how such a construction can be reconciled with Congress's purpose in enacting the Johnson Act's present "gambling device" definition "to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

There is likewise no merit to respondent's assertion that Section 1171(a)(2) must be construed as the Eighth Circuit construed it so as not to "eviscerate IGRA's express authorization of 'technologic aids' in connection with Class II gaming." Br. in Opp. 14. That argument conflates the question on which the Eighth Circuit ruled against respondent—*i.e.*, that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, does not provide an implied exemption from the

Johnson Act for Class II "technologic aids"—with the question presented here of the construction of the Johnson Act's "gambling device" definition. That second question turns on what the Eighty-Seventh Congress said and meant in enacting Section 1171(a)(2) in its present form, *not* on what the One Hundredth Congress that enacted IGRA might have thought Section 1171(a)(2) or other provisions of the Johnson Act to mean. In any event, construing Section 1171(a)(2), consistent with its text, purpose, and legislative history, to include devices such as Lucky Tab II leaves a wide array of Class II "technologic aids" outside the Johnson Act. Those include the very sorts of "technologic aids" discussed in the Senate Report on IGRA, such as "telephone, cable, television or satellite" equipment to "link[] participant players at various reservations." S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988); see Pet. 13, *Seneca-Cayuga Tribe*, *supra* (discussing that subject). Contrary to respondent's suggestion (Br. in Opp. 14-15), "aids" of that sort ordinarily would not satisfy the Johnson Act's "gambling device" definition, for the obvious reason that they ordinarily are not "designed and manufactured primarily for use in connection with gambling." 15 U.S.C. 1171(a)(2).

Respondent next errs in asserting that "the government cannot present a united position" on the question whether the Johnson Act's "gambling device" definition encompasses Lucky Tab II and similar machines. Br. in Opp. 15. The position expressed on that question in the certiorari petition (as well as in the government's submissions to the courts below) is the position of the United States. The same position has been expressed by the federal parties, which include the National Indian Gaming Commission (NIGC), in the parallel Tenth Circuit case, *Seneca-Cayuga Tribe* v. *NIGC*, 327 F.3d 1019 (2003). Moreover, while the NIGC has promulgated regulations classifying "pull tab dispensers and/or readers" as "technologic aids" to Class II gaming within the meaning of *IGRA*, 25 C.F.R. 502.7(c), the NIGC's regulations do not

address whether such machines are "gambling devices" under *the Johnson Act*. Nor does respondent identify any less formal determination by the NIGC that Lucky Tab II or similar machines do not satisfy the Johnson Act's definition of "gambling device." In any event, the NIGC does not have any authority to interpret or enforce the Johnson Act, which is not confined in its application to Indian country and is enforced by the Department of Justice.[2]

B. RESPONDENT CANNOT RECONCILE THE DISAGREEMENT BETWEEN THE EIGHTH AND NINTH CIRCUITS ON THE QUESTION PRESENTED HERE

As the certiorari petition explains (at 16-18), the Ninth Circuit has held that the Johnson Act's "gambling device" definition is satisfied by a machine that, like Lucky Tab II, dispenses pieces of paper, the contents of which determine whether the player has won or lost, from a removable preprinted paper roll. See *United States* v. *Wilson*, 475 F.2d 108 (9th Cir. 1973) (per curiam). An essential predicate of the Ninth Circuit's holding in *Wilson* is that the "element of chance" under Section 1171(a)(2) may be provided by the sequence of symbols on the paper roll. In this case, however,

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[2] Although respondent repeatedly alludes to advice that it received from NIGC personnel to replace the concededly by IGRA Class III devices in its casino with Lucky Tab II devices (*e.g.*, Br. in Opp. 7-9, 15-16), respondent omits to mention contrary advice that it subsequently received from the United States Attorney's Office not to install Lucky Tab II because it is a "gambling device" under the Johnson Act and a Class III device under IGRA. See Gov't C.A. App. 215 (Assistant United States Attorney states, without contradiction, at district court evidentiary hearing that "Mr. Schulte [respondent's counsel] knows full well that even though the commission had advised in that letter that they should initiate the operation [*i.e.*, the installation of Lucky Tab II], we provided to them oral notice that they shouldn't go forward."). In view of such advice, it was hardly "[r]emarkabl[e]," as respondent asserts (Br. in Opp. 10), that the United States took the position that respondent's installation of Lucky Tab II did not provide a basis for relief from the prior contempt order.

the Eighth Circuit held that the "element of chance" cannot be provided in that manner. The two decisions are consequently irreconcilable.

Respondent cannot meaningfully distinguish *Wilson* from the present case. Respondent asserts that *Wilson* "proceeded on [the] premise * * * that any sale of chances to win a prize constituted illegal gambling" under state law, whereas the traditional game of paper pull-tabs is legal under state law. Br. in Opp. 17. Nothing in *Wilson* supports that conclusion. To the extent that *Wilson* referred to state law at all, it was in the context of addressing whether several state court decisions construing *state* gambling statutes supported by analogy the court's construction of the term "element of chance" in the Johnson Act. And it did so for the purpose of resolving an issue, not presented here, whether an "element of chance" existed even though the Bonanza machine revealed to the player the content of the coupon that he would receive by inserting his coin. See 475 F.2d at 109. (The court of appeals concluded that the "element of chance" existed because the player would also be gambling on the content of the subsequent coupon. *Ibid.*) Moreover, even if respondent is correct that the traditional game of *paper* pull-tabs is lawful in Nebraska, that would be irrelevant to whether Lucky Tab II satisfies the Johnson Act's "gambling device" definition. That definition does not turn on whether a device might—through "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837—incorporate some aspects of a game of chance that state law permits to be played *without* any mechanical means. Were it otherwise, a video poker machine presumably could not qualify as a gambling device, so long as state law allowed the playing of the traditional card game of poker for any stakes. Nor, presumably, could a roulette

wheel qualify as a gambling device, so long as state law allowed gambling on numbers drawn from a hat.[3]

Respondent further contends that, because the Ninth Circuit has held (contrary to the Eighth Circuit here) that IGRA provides an implied exemption from the Johnson Act for Class II "technologic aids" used at tribal casinos, there is no "certworthy conflict" between the decisions here and in *Wilson*. Br. in Opp. 18 (citing *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000)). In the first place, the Ninth Circuit's holding on the implied exemption question is incorrect, conflicts with the Eighth Circuit's decision in this case on that question, and independently warrants review and reversal by this Court for the reasons stated in the certiorari petition and reply brief in *Seneca-Cayuga*. And, in any event, respondent is incorrect that the consequence of that holding is that "Lucky Tab II and other Class II aids are * * * no more illegal in the Ninth Circuit than they are in the Eighth Circuit." Br. in Opp. 18. Even under *103 Electronic Gambling Devices*, devices such as Lucky Tab II and Bonanza are illegal in the Ninth Circuit in the various contexts in which the Johnson Act applies outside of Indian country. Under the Eighth Circuit's decision in this case, by contrast, such gambling devices have been rendered legal wherever the Johnson Act applies.

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[3] That is not to say that state law has no role in the application of the Johnson Act. The Johnson Act provision under which the defendant was prosecuted in *Wilson*, 15 U.S.C. 1172, provides an exemption for the interstate transportation of gambling devices to places where their use is permissible. No comparable exemption based on state law is contained in 15 U.S.C. 1175(a), which prohibits gambling devices in, *inter alia*, Indian country.

C. RESPONDENT PROVIDES NO VALID BASIS TO DISCOUNT THE IMPORTANCE OF THE QUESTION PRESENTED HERE

Because the Eighth Circuit's unduly constricted definition of "gambling device" extends to all contexts in which the Johnson Act applies, this case has significant ramifications both inside and outside Indian country. It threatens the United States' ability to regulate gambling devices in federal enclaves and possessions, see 15 U.S.C. 1175(a), as well as to assist States in preventing the shipment of gambling devices into their territory, see 15 U.S.C. 1172(a). See Pet. 18-19. The importance of the question is not diminished, as respondent suggests, merely because the Eighth Circuit's decision has not yet produced demonstrable "detrimental effects." Br. in Opp. 19. In view of the United States' position in this case and *Seneca-Cayuga* that Lucky Tab II and similar machines are "gambling devices" within the prohibitions of the Johnson Act, prudent persons could be expected to await the conclusion of these cases before taking action that could subject them to prosecution under that Act.[4]

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[4] Respondent is incorrect in stating that *Diamond Game Enterprises, Inc.* v. *Reno*, 230 F.3d 365 (D.C. Cir. 2000), "rejected the [government's] claim that Lucky Tab II dispensers are prohibited by the Johnson Act." Br. in Opp. 18-19. *Diamond Game* was solely concerned with the classification of Lucky Tab II under IGRA. The court of appeals' analysis turned on whether the device more closely resembled an "aid" to the traditional game of paper pull-tabs (and thus was a Class II device under IGRA) or a "facsimile" of that traditional game (and thus was a Class III device under IGRA). See 230 F.3d at 370; see also 25 U.S.C. 2703(7)(A)(i) (referring to Class II "aids"); 25 U.S.C. 2703(7)(B)(ii) (referring to Class III "facsimiles"). Although the NIGC's regulations at that time defined a Class III device as "any gambling device as defined in [the Johnson Act]," 25 C.F.R. 502.8 (1993), the court of appeals did not address whether Lucky Tab II satisfied the Johnson Act's "gambling device" definition or otherwise intimate that Lucky Tab II could permissibly be used outside the tribal gaming context.

The Eighth Circuit's decision, while independently significant for federal law enforcement, takes on added significance when considered with the Tenth Circuit's decision in *Seneca-Cayuga*. Both cases involve similar machines used at tribal gaming facilities. Both cases, as briefed and argued below, presented the questions (i) whether IGRA provides an implied exemption from the Johnson Act for "gambling devices" that are used as "technologic aids" to Class II games such as bingo and pull-tabs, and (ii) whether, if not, Lucky Tab II (or the similar Magical Irish game in *Seneca-Cayuga*) is a prohibited "gambling device" under the Johnson Act. The Tenth Circuit, having answered the first question in the affirmative (and thus contrary to the Eighth Circuit here), did not reach the second. In order comprehensively to resolve these questions, therefore, the Court should grant review in both cases and consolidate them for argument.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case should be consolidated for argument with *Ashcroft* v. *Seneca Cayuga Tribe*, No. 03-740.

Respectfully submitted.

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